Supreme Court, U.S.
FILED
NOV 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-268

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MERYL SUE BAKER,
Petitioner,

v.

DEPARTMENT OF THE NAVY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

Eric R. Glitzenstein
(Counsel of Record)
Katherine A. Meyer
Alan B. Morrison

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

November 1987

CASELAS PRESS INC. 1717 K STREET NW WASHINGTON, DC 223-1220

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Far from demonstrating that the Court should not grant review in this case, respondent's brief serves to highlight the importance of this case to the operation of the Privacy Act. In addition, the conflict that previously existed between the Ninth Circuit's restrictive approach to the statute, and the more expansive approach taken by other courts, has become even sharper in light of the D.C. Circuit's recent decision in *Dickson v. Office of Personnel Management*, 828 F.2d 32 (1987).

1. As a preliminary matter, it is essential to clarify what this case does and does not involve. Contrary to respondent's

repeated suggestions, this case does not concern the scope of the Privacy Act's access provision, 5 U.S.C. § 552a(d) (1). Petitioner was provided with a copy of the report about her before she even filed this lawsuit, and thus her complaint contains no request for access to that document. Accordingly, respondent's references to the Office of Management and Budget's analysis of the scope of the access provision, as well as the cases which have followed that analysis, have no bearing on this case. Resp. Br. at 8-9.

Rather, this case raises the question of whether individuals who already know that a particular document was used to make decisions adversely affecting their lives have any rights under the Privacy Act with respect to that document. Here, petitioner was informed by the Navy that the report at issue was prepared solely because her subordinate had filed a grievance against her, and that the report contained highly damaging evaluations of her supervisory abilities. In addition, despite the fact that the report was never placed in petitioner's own file, as respondent asserts is "typically" the case when an agency "make[s] a determination about the individual," Resp. Br. at 6 n.2, the report was *in fact* used by the Navy as the principal basis for demoting and officially reprimanding her. Moreover, as respondent now essentially concedes, *see* Resp. Br. at 2 n.1, the report was so erroneous that the adverse actions taken against petitioner on the basis of it were summarily reversed after petitioner filed a grievance alleging sex discrimination and retaliation.

Despite all of this, the Navy continues to maintain the report in its files, and there is nothing to prevent it from using the report again to make adverse decisions about plaintiff or from disseminating it to others. To conclude, as did the Ninth Circuit, that individuals have *no* Privacy Act rights in such circumstances, merely because the file in which the

agency chooses to place the offending document has another person's name on it, is to make a mockery of the Act. And this outcome cannot be justified on the ground that it is compelled by the language of the Privacy Act. Thus, while the access provision of the statute, which is not at issue here, speaks in terms of records that are "contained in the system [of records]," 5 U.S.C. § 552a(d) (1), the causes of action on which petitioner sued contain no such limiting language. Indeed, as petitioner demonstrated in her opening brief (at 7-8), and explains again below, the Ninth Circuit's dismissal of petitioner's claims is in direct conflict with other circuit court rulings on this issue.

2. While it is not evident from the government's brief in opposition, petitioner's complaint sought two basic forms of relief. Thus, she invoked section (g) (1) (C) of the Privacy Act, which creates a cause of action when erroneous records are used to make adverse decisions about individuals, *see Dickson, supra*, 828 F.2d at 37, as well as section (g) (4), which authorizes suits for actual damages resulting from violations of section (g) (1) (C). Based on these provisions, petitioner requested monetary relief for, among other things, the injury "intentionally" inflicted on her "professional reputation and career" by the Navy's misuse of the "grossly inaccurate and incomplete" report prepared about her. The Ninth Circuit held that petitioner could not obtain damages or any other relief because the Davis report was not placed in her own "system of records," but that approach is flatly contrary to the District of Columbia Circuit's analysis of the Privacy Act. Thus, while *Albright v. United States*, 631 F.2d 915 (1980), focused on another substantive provision of the Privacy Act, its principal reason for not restricting the coverage of the statute in the manner urged by respondent and adopted by the Ninth Circuit was that the particular provision at issue,

like those involved in this case, contains no requirement that the offending record be physically located in a system of records that is retrievable under the individual's name or other personal identifier. *Id.* at 918-20.

Moreover, shortly after the petition was filed in this case, the D.C. Circuit relied on a similar rationale in refusing to limit the scope of the statutory provisions that authorize damages when erroneous records are used to make adverse determinations about individuals. *See Dickson, supra.* Writing for a unanimous panel, Circuit Judge James Buckley stated that the damages provision "carves out no special exception or waiver selectively immunizing agencies from civil actions. Rather, in a straightforward manner, the Act establishes a predicate condition that records be maintained with requisite fairness." *Dickson, supra,* 828 F.2d at 37. Furthermore, the court stressed that, under the plain language of the provision, there is a "civil remedy action whenever *'any agency'* fails to maintain *'any record'* in such manner as to assure 'fairness in *any determination* relating' " to the individual. *Id.* at 39 (emphasis in original), *quoting* 5 U.S.C. § 552a(g) (1) (C). This reading of the provision, the court reasoned, also furthers the statute's goal of protecting "individuals from injury that can result from the bureaucratic habit of collecting and retaining information, however dated, prejudicial, or false." *Id.* at 38.

As is evident, the D.C. Circuit does not interpret section (g) (1) (C) of the Privacy Act as containing a requirement that the "dated, prejudicial, or false" records that form the basis of a damages action must actually be located in a "system of records" bearing the names of the persons who have been injured by them. Thus, under the D.C. Circuit's decisions in *Dickson* and *Albright,* individuals may seek damages for injuries caused by an agency's misuse of records, and their

claims cannot, as occurred here, be dismissed merely because of where the agency has opted to file the offending records. Hence, there is a clear conflict between the Ninth Circuit and the D.C. Circuit regarding the circumstances under which individuals may pursue damages under the Privacy Act.

3. The other relief sought by petitioner's complaint was amendment of the report about her, along with an injunction prohibiting the Navy from disseminating it in its present inaccurate and incomplete form. Like the Privacy Act's damages provision, the plain language of the provision concerning amendment of records does not include a requirement that the erroneous records be physically located in the file of the individual seeking relief. Thus, section (d) (2) of the statute states only that an individual may "request amendment of a record pertaining to him," and section (d) (3) permits an "individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal." Likewise, section (g) (1) (A), upon which petitioner expressly relied in her complaint, states that "[w]henever any agency. . . makes a determination under subsection (d) (3) not to amend an individual's record in accordance with his request," the individual may bring a civil action against the agency to obtain the amendment. Contrary to the Ninth Circuit's ruling, there is nothing in these provisions which limits their applicability to records that are physically found in an individual's own file.

This plain language reading of the Privacy Act's amendment provisions was expressly adopted by one of the cases cited by respondent, *Clarkson v. Internal Revenue Service*, 678 F.2d 1368 (11th Cir. 1982). Thus, while the Eleventh Circuit found that the statute's access provision, which is not at issue here, may be limited to records contained within an individual's own system of records, it also recognized that "sec-

tions (d) (2) and (d) (3). . . contain no such restrictions. . . [P]aragraph (d) (2) refers only to 'a record.' " *Id.* at 1376. In addition, the Eleventh Circuit emphatically rejected the notion—which was accepted by the Ninth Circuit and is again urged by respondent in this Court—that all of the Privacy Act's rights and remedies must be confined to records that can be obtained under the statute's access provision: "This argument, however, ignores not only the plain language of the statute, but also the reality that the Privacy Act is not the exclusive means for obtaining access to records maintained by an agency." *Id.* Thus, there is also a patent conflict between the Ninth Circuit and the Eleventh Circuit regarding the scope of the statute's amendment provision.

4. Finally, the government's attempt to distinguish this case from the Fifth Circuit's decision in *Chapman v. NASA*, 682 F.2d 526 (1982), is unsuccessful. Respondent suggests that *Chapman* is not in conflict with this case because it involved the question of *when* damaging documents must be placed in an individual's file and "[t]his case, by contrast, presents no question pertaining to the [Privacy Act's] timeliness requirement." Resp. Br. at 12. But as respondent concedes, the underlying assumption in *Chapman* was that records which are actually used by the government to make decisions harming an individual's employment status must, at some time, be placed in the individual's own file. Under that analysis, this case involves an even more egregious violation of the Privacy Act than that discerned by the Fifth Circuit, because the report at issue was used to demote and reprimand petitioner, yet it has *never* been placed in her file.

* * * *

In sum, the Ninth Circuit has adopted an extraordinarily narrow reading of the Privacy Act's scope which allows the idiosyncracies of an agency's filing system, or the whims of

those who use it, to control whether individuals may obtain damages for, and amendment of, erroneous records that have caused them injury. This reading is in conflict with the plain language of the Act, rulings of three courts of appeals, and the fundamental objectives underlying the statute. The decision below should, therefore, be reviewed by this Court.

Respectfully submitted,

Eric R. Glitzenstein
(Counsel of Record)
Katherine A. Meyer
Alan B. Morrison

Public Citizen Litigation
Group
Suite 700
2000 P Street, N.W.
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